



ARNOLD & PORTER
555 TWELFTH STREET
WASHINGTON, DC 20004-1206

Paper No. 26

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In re Application of
Metz et al.
Application No. 08/657,749
Filed: May 30, 1996
Attorney Docket No. 16518.025

**OFFICE OF PETITIONS
ON PETITION**

This is a decision on the renewed petition under 37 CFR 1.137(b), filed on May 13, 2002 (Monday), to revive the above-identified application.

The renewed petition is **GRANTED**.

The application became abandoned on October 24, 1998 for failure to timely submit a proper reply to a non-final Office Action, mailed on June 23, 1998, setting forth a 1-month shortened statutory period for reply.¹ The September 5, 2001 petition to revive was dismissed on March 12, 2002 for lacking the reply and the statement of unintentional delay required by 37 CFR 1.137(b)(1) and (b)(3), respectively.

The instant petition encloses a "Response to Restriction Requirement" as reply to the June 23, 1998 non-final Office Action, and a statement required by 37 CFR 1.137(b)(3) that the entire delay in filing the required reply from its due date until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional.² The renewed petition is thus granted.

No fee is incurred for a renewed petition under 37 CFR 1.137(b).

¹ Applicants obtained a 3-month extension of time on 10/26/98 (Certificate of mailing date 10/21/98).

² Contrary to counsel's assertion, the 9/5/01 petition did not contain the statement required under 37 CFR 1.137(b)(3). Counsel's being argumentative on this point indicates counsel's unfamiliarity with the pertinent statute, rules, PTO practice, and the underlying rationale. The delay at issue is contained in 2 periods: 1 spanning from when the reply is due to when the application becomes abandoned; the other from the date of abandonment to when a grantable petition under 37 CFR 1.137 is filed. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. The Office relies on the applicant's/attorney's duty of candor and good faith in accepting a 37 CFR 1.137(b)(3) statement. Had the application not been abandoned for an extensive period of time such as more than 3 years in the instant case upon filing of the 9/5/01 petition, a statement that "the entire delay was unintentional" may have been construed as meeting the requirements of 37 CFR 1.137(b)(3) and consequently accepted. Counsel is reminded that if an applicant intentionally delays the filing of such a petition, a statement that the entire delay was unintentional is inappropriate and may have an adverse effect when attempting to enforce any patent resulting from the application. See MPEP 711.03(c)(III)(C) (Aug. 2001).

The associate power of attorney has been entered and made of record.

The application file is being returned to Technology Center 1600 for review of the "Response to Restriction Requirement" submitted with the instant petition and the accompanying argument contained in the instant petition.

Telephone inquiries concerning this decision should be directed to the undersigned at (703) 308-0763.

A handwritten signature in black ink, appearing to read 'RC Tang', with a stylized flourish at the end.

RC Tang
Petitions Attorney
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy